March 17, 1997

MEMORANDUM TO: Distribution

FROM: Michael J. Rubino, Associate Director
Acquisition Services Branch

SUBJECT: Policy Memorandum 97-005 - Contracting for Subsidiaries

1. Purpose. The purpose of Policy Memorandum No. 97-005 is to establish policies and procedures for contracting on behalf of subsidiary corporations of failed financial institutions (Receiverships).

2. Scope. The policies and procedures provided herein are supplemental and in addition to those stated in Circular 3700.16, Acquisition Policy Manual (APM), dated October 3, 1996. The provisions of this Policy Memorandum apply to all Contracting Officers and other Acquisition Services Branch personnel who are involved with contracting for goods and services on behalf of subsidiaries. It does not apply to contracting for legal services.

3. Background

A subsidiary, for purposes of this memorandum, is a corporation owned in whole or in part by a Receivership. The majority of Receivership subsidiaries were created by the financial institution for the single purpose of taking and holding title to a parcel of real estate. Other Receivership subsidiaries may include travel agencies, insurance companies, equipment lessors, securities underwriters, loan servicers and originators as well as real estate developers and managers.

The Board of Directors and officers of a subsidiary, not FDIC or the Receivership, are responsible for managing the business and affairs of the subsidiary. While the individuals acting as directors and officers of the subsidiary may be FDIC employees, FDIC policies and procedures otherwise applicable to the Receivership do not necessarily apply to the subsidiary.

The directors of the subsidiary must determine, in the exercise of both their fiduciary duty to the subsidiary and their business judgment, if the subsidiary will be subject to specific FDIC policies and procedures. It is imperative that the independent legal status of the subsidiary be maintained to ensure that the corporate veil of the subsidiary is not pierced. Where the corporate veil of subsidiary is pierced, as might occur if the parent of the subsidiary was deemed to be exercising undue control of the subsidiary, the limited liability of a subsidiary's shareholder may be lost and the shareholder would then be directly liable for the debts and obligations of the subsidiary.

4. Applicability of the APM. The APM shall not apply to a subsidiary unless the subsidiary elects that it apply. The election to follow the APM and have Warranted Contracting Officers in the Acquisition Services Branch (ASB) contract on behalf of the subsidiary requires a Board Resolution (Resolution) and a Service and Agency Agreement (SAA).

a. Board Resolution. The Resolution provides authority to FDIC to take a specified action(s) on behalf of the subsidiary. For purposes of this memorandum, the Resolution would have to authorize FDIC to contract for goods and services on its behalf. Resolutions of this nature may not go into detail about the assets or management responsibilities to be transferred to the FDIC. Therefore, after the Resolution is adopted, the subsidiary and FDIC shall enter into a formal SAA that specifies the assets for which contracting support is to be provided.

b. Service and Agency Agreement. SAAs are discussed in Section XIII. *Management and Disposition of Subsidiaries* of the Asset Disposition Manual. Under an SAA, asset management responsibilities are identified and transferred by the subsidiary to FDIC. The appropriate officials of the Division of Resolutions and Receiverships (DRR) and the subsidiary are responsible for executing SAAs. It is DRR's responsibility to ensure that the individuals that sign SAAs have the proper delegated authority. When the SAA identifies management responsibilities and assets requiring contracting support, that support shall be performed by Warranted Contracting Officers in ASB in accordance with the APM. This will be the case regardless of the subsidiary's operating status.

5. Contracting Capacity. When a third party contract is to be executed, for a subsidiary asset(s), the contract shall be in the receivership capacity and signed by the "FDIC, as Receiver for (institution), as Agent for (subsidiary)."

6. Processing Invoices. When contracting on behalf of a subsidiary, the Contracting Officer shall receive and generally process all invoices in accordance with the APM. However, two exceptions are required. First, contracts for subsidiaries shall be entered in the Purchase Order System as a "Y class" entry. This indicates that any resulting invoices shall not be paid by FDIC. Second, the Contracting Officer shall review all invoices in accordance with the terms and conditions of the contract and forward these invoices to the Oversight Manager for approval. After the invoice is approved, the Contracting Officer shall keep a copy for the file and send the original invoice to the subsidiary for payment.

7. Documentation. The Contracting Officer shall obtain both the Resolution and SSA from the Program Office that supports contracting on behalf of the subsidiary and place it in the official contract file.

8. Effective Date. This Policy Memorandum is effective immediately.

9. Contacts. If you have questions regarding this Policy Memorandum, please call Dave McDermott on (202) 942-3434.

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